

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL BLAKEMAN,

Plaintiff,

v.

RICHARD BLAKEMAN,

Defendant.

**AFFIRMATION IN SUPPORT OF
PLAINTIFF'S MOTION**

Case No.: 13-cv-07348-LTS

JUSTIN MERCER, an attorney admitted to practice law before the courts of the State of New York, affirms the following to be true pursuant to Section 2106 of the New York Civil Practice Laws and Rules ("CPLR") and under the penalties of perjury:

1. I am an associate with the law firm Lewis & Lin LLC, attorneys for Plaintiff RACHEL BLAKEMAN ("Plaintiff").

2. I am familiar with the facts and circumstances of the instant action based upon records and files maintained by this office and upon Plaintiff's statements.

3. I submit this affirmation in support of Plaintiff's motion for sanctions pursuant to Rule 11, 28 U.S.C. § 1927, and the Court's inherent power.


4. A true and correct copy of an excerpt from the transcript of the hearing dated March 5, 2012 before Hon. Ellen Gesmer of the New York State Supreme Court is annexed hereto as **Exhibit A**.

5. A true and correct copy of the letter dated December 16, 2013 from Defendant's counsel, attaching a copy of the Police Report dated February 15, 2012, is annexed hereto as **Exhibit B**.

6. A true and correct copy of the letter dated December 18, 2013 from Plaintiff's counsel that attaches the February 2, 2012 email from Defendant's matrimonial

counsel, Alex Potruch, Esq., to Plaintiff's matrimonial counsel, Marian Shelton, Esq. and the police report dated February 14, 2012 is annexed hereto as **Exhibit C**.

Dated: Brooklyn, New York
January 7, 2014



JUSTIN MERCER

Exhibit A

1
2 SUPREME COURT OF THE STATE OF NEW YORK

3 NEW YORK COUNTY: CIVIL TERM: PART 24

4 -----X
5 RACHEL BLAKEMAN, : Index No.
6 : 302293/12

7 Plaintiff(s). :

8 -against- :

9 RICHARD BLAKEMAN, :

10 Defendant(s). :

11 -----X

12 71 Thomas Street
13 New York, New York 10013

14 March 5, 2012

15 B E F O R E:

16 THE HONORABLE ELLEN GESMER, Justice

17 A P P E A R A N C E S:

18 MARIAN R. SHELTON, ESQ.
19 Attorney for the Plaintiff
20 575 Lexington Avenue 4th Floor
21 New York, NY 10022

22 ALEXANDER POTRUCH LLC
23 Attorneys for the Defendant
24 666 Old Country Road Suite 700
25 Garden City, NY 11530
26 By: ALEXANDER POTRUCH, ESQ.

JEANETTE LAKE-MASON, CSR, RMR
Official Court Reporter

Proceedings

MR. POTRUCH: Thank you for listening, your Honor. I've completed my summation.

THE COURT: Okay.

I find that Ms. Blakeman's testimony was very credible; and I find, regrettably, that Mr. Blakeman's testimony was not credible. Accordingly, I find that Mr. Blakeman has engaged in a constant and continuing pattern of yelling at Mrs. Blakeman, berating her both in person and in front of the children, and threatening her; and also that he has refused to leave her to give her any peace in the apartment; and has on several occasions picked a lock of the room where he was -- where she was and entered that room, despite her request that he not do so.

I also find that he accessed her computer without her permission and deleted files from her computer without her permission; and that he accessed mail directed to her, including mail containing medications, and took that without her permission.

Based on that, I find that Mr. Blakeman committed family offenses, including, but not limited to harassment in the second degree, Penal Law section 240.26 subdivision 3, criminal mischief in the fourth degree. Therefore, I find there's a sufficient basis for entering an order of protection against him, and I do so for a period of one year.

Proceedings

1
2 This is a complete stay away with a carve-out for
3 any access time pursuant to an order of this Court or by
4 agreement of the parties. I would hope that the parties
5 can agree on an access schedule, and I'll be happy to so
6 order it.

7 If there was any lack of clarity in my previous
8 order that made Mr. Blakeman uncomfortable with exercising
9 his access last weekend, that's regrettable and was not my
10 intention; but the permanent order will include a specific
11 carve-out for any agreement with regard to access to the
12 children, which I certainly expect he will have.

13 However, I must caution Mr. Blakeman that it's
14 really critical that he not say anything negative about
15 Mrs. Blakeman to the children, just as I expect
16 Mrs. Blakeman will not say anything negative about him to
17 the children. But if either party were to say negative
18 things about each other to the children, that would
19 certainly have a major impact on any ultimate access
20 arrangement I will order.

21 I suggest that you might find it helpful to
22 consult with a mental health professional with regard to
23 how to explain this to the children. Apparently, that has
24 not been done sufficiently.

25 So we need a date to come back to court to
26 proceed further. Unfortunately, because of the time I'm

Proceedings

going to have to have -- I'm going to direct
counsel -- I'm going to, unfortunately, have to have the
parties step out. I am going to direct counsel to serve
the order of protection on his client.

MR. POTRUCH: Oh, no problem, your Honor.

THE COURT: So would the parties step out, and
counsel can stay and we'll figure out what to do next.

Counsel, why don't you step up and see if we can
figure out a schedule.

MS. SHELTON: Did you say to step up, your Honor?

THE COURT: Yes.

(Whereupon, the matter concluded)

* * *

C E R T I F I C A T E

This is certified to be a true and accurate
transcription of the stenographic minutes taken in the
above proceedings.

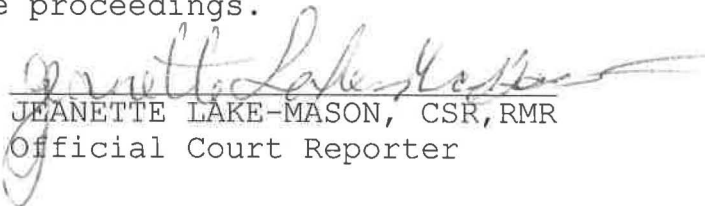

JEANETTE LAKE-MASON, CSR, RMR
Official Court Reporter

Exhibit B

ALAN M. NELSON
ATTORNEY AT LAW

3000 MARCUS AVENUE, SUITE 1E5
LAKE SUCCESS, NEW YORK 11042
TELEPHONE: (516) 328-6200
FAX: (516) 328-6354
E-mail: anelsonlaw@aol.com

NEW YORK OFFICE:
111 JOHN STREET
SUITE 640
NEW YORK, NY 10038

December 16, 2013

BY U.S. & ELECTRONIC MAIL

Justin Mercer, Esq.
Lewis & Lin, LLC
45 Main Street, Suite 608
Brooklyn, N.Y. 11201

Re: Rachel Blakeman v. Richard Blakeman
13-cv-07348 (LTS)

Dear Mr. Mercer:

Please accept this correspondence as a response to your e-mail of December 6, 2013. By that correspondence and in our follow-up discussions you, on behalf of your client, have threatened that if Richard Blakeman does not “withdraw the counterclaim and certain baseless denials contained within the Answer” that you shall file a proposed motion pursuant to Rule 11 of the Fed. Rules of Civil Procedure seeking sanctions and attorney fees.

As I have informed you, the defendant will not withdraw his counterclaim. A factual basis for the counter-claim has at all times relevant existed. As I have previously informed you, Richard Blakeman filed a Domestic Incident Report with the New York City Police Department on February 16, 2012. In that report Mr. Blakeman alleged that on February 7, 2012 he “noticed that my personal non-shared computer had been accessed”. When he confronted your client, Rachel Blakeman, she “did not deny it”. Mr. Blakeman further reported that upon closer inspection of his personal computer he realized that Rachel Blakeman downloaded and deleted files on his personal computer, which downloaded files included “confidential attorney-client” and “doctor-patient privileged documents”.

As we discussed the report was filed with New York City Police Department by Mr. Blakeman on February 16, 2012, a full year before his Examination Before Trial in the matrimonial action where the allegation of his improperly accessing Rachel Blakeman’s computer and e-mail accounts was first asserted. Moreover, the report was filed more than 20 months prior to the allegations Rachel Blakeman raises in the instant complaint.

Rule 11(b)(3) of the Fed. Rules of Civil Procedure requires that counsel conduct a reasonable inquiry under the circumstances of whether factual contentions made in a pleading have evidentiary support, or will likely have evidentiary support.

Justin Mercer, Esq.
December 16, 2013
Page 2

The existence of a sworn statement of fact, filed with the New York City Police Department, close to year prior to any allegations of wrongdoing made by your client, clearly comports with and fully satisfies the requirement of reasonable inquiry set forth in Rule 11. Indeed, as discovery will reveal the defendant possesses evidentiary support to demonstrate what materials were improperly downloaded.

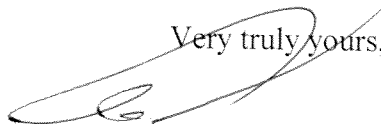
I have enclosed a copy of the Police Report for you and your client's review. (See Exhibit "A"). Having now been provided with the report, you and your client on clear notice that the demand to withdraw the counter-claim because it lacks any evidentiary support is without merit. Therefore by proceeding upon the motion you will be in violation of Rule 11(b)(1) the motion being "presented for an improper purpose, such as harass... or needlessly increase the cost of litigation, (2) because the defendant's claims "are warranted by existing law" and (3) "the factual allegations have evidentiary support".

Were you to proceed with the threatened motion we shall cross-move pursuant to Rule 11 and seek appropriate attorney fees, pursuant to Rule 11(c)(2). You have been placed on actual notice that the allegations contained in the counter-claim have a factual basis that precedes any motive to fabricate.

With respect to you complaints concerning the contents of ¶¶ 35 and 38 of the defendant's answer, we are prepared to discuss the modification of the answer to ¶35.

Kindly advise as to your position at your earliest possible convenience so as to avoid the necessity for the applications discussed herein.

Very truly yours,

A handwritten signature in black ink, appearing to read "Alan Nelson", written over the closing "Very truly yours,".

Alan Nelson

enclosure

cc: Richard Blakeman

EXHIBIT “A”

Month	Day	Year	Time (24 hrs)	Address of Occurrence	APT #	Incident #
2	15	12	1130	401 E 74st	8F	
Month	Day	Year	Name (Last, First, M.I.) / (include aliases)			
2	16	12	Blakeman Richard			
Injured? <input checked="" type="radio"/> No <input type="radio"/> Yes				Removed to Hospital? <input checked="" type="radio"/> No <input type="radio"/> Yes if yes, what hospital?		
Describe:				<input checked="" type="radio"/> White <input type="radio"/> Black <input type="radio"/> Asian <input type="radio"/> Hispanic <input type="radio"/> Native American <input type="radio"/> Non-Hispanic <input type="radio"/> Unknown <input type="radio"/> Other:		
Name (Last, First, M.I.) / (include aliases)				Phone		
Blakeman Rachel				212 472 9108		
Street & City				Zip		
401 E 74st				8F		
Injured? <input type="radio"/> No <input type="radio"/> Yes				Removed to Hospital? <input type="radio"/> No <input type="radio"/> Yes if yes, what hospital?		
Describe:				<input type="radio"/> White <input type="radio"/> Black <input type="radio"/> Asian <input type="radio"/> Hispanic <input type="radio"/> Native American <input type="radio"/> Non-Hispanic <input type="radio"/> Unknown <input type="radio"/> Other:		
SUSPECT/P2 present?				RELATIONSHIP: (SUSPECT / P2 to VICTIM / P1)		
<input type="radio"/> Yes <input type="radio"/> No				<input type="radio"/> Married <input type="radio"/> Formerly Married <input type="radio"/> Intimate Partner/Dating <input type="radio"/> Former Intimate/Dating <input type="radio"/> Child of victim/party 1 <input type="radio"/> Parent of victim/party 1 <input type="radio"/> Relative <input type="radio"/> Other:		
LIVING SITUATION				Prior DV History? <input checked="" type="radio"/> Yes <input type="radio"/> No		
Do parties currently live together? <input type="radio"/> Yes <input type="radio"/> No				Prior DV police report? <input checked="" type="radio"/> Yes <input type="radio"/> No		
IF NO, have they lived together in the past? <input type="radio"/> Yes <input type="radio"/> No				Victim fearful? <input type="radio"/> Yes <input checked="" type="radio"/> No		
Do the parties have a child-in-common? <input type="radio"/> Yes <input type="radio"/> No				Access to weapons? <input type="radio"/> Yes <input checked="" type="radio"/> No		
				Suspect: Drug/Alc History? <input type="radio"/> Yes <input checked="" type="radio"/> No		
				Suspect: Hx suicide threat? <input type="radio"/> Yes <input checked="" type="radio"/> No		
				Suspect: Probation/Parole? <input type="radio"/> Yes <input checked="" type="radio"/> No		

(Check all that apply)	<input type="radio"/> Impaired Alcohol/Drugs <input type="radio"/> Injury to Child <input type="radio"/> Injury to Other Persons <input type="radio"/> Injury to Pet/Animal <input type="radio"/> Interference with Phone <input type="radio"/> Intimidation/Coercion <input type="radio"/> Kicking <input type="radio"/> Punching	<input type="radio"/> Pushing <input type="radio"/> Sexual Assault <input type="radio"/> Shooting <input type="radio"/> Slapping <input type="radio"/> Slamming Body <input type="radio"/> Stabbing <input type="radio"/> Strangulation/"Choking" <input type="radio"/> Suicide or Attempt	<input type="radio"/> Threw Items <input type="radio"/> Unwanted Contact <input type="radio"/> Verbal Abuse <input type="radio"/> Violated Visitation/ Custody Conditions <input checked="" type="radio"/> OTHER Suspect Actions: Dispute	<input type="radio"/> Threats: (specify) <input type="radio"/> Injury/Kill Persons <input type="radio"/> Injury/Kill Self <input type="radio"/> Injury/Kill Pet/Animal <input type="radio"/> Take Child <input type="radio"/> Destroy/Take Property <input type="radio"/> Other:	<input type="radio"/> Threat with weapon <input type="radio"/> Weapons used: (specify) <input type="radio"/> Blunt Object <input type="radio"/> Gun <input type="radio"/> Motor Vehicle <input type="radio"/> Sharp Instrument <input type="radio"/> Other:
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Arrest Made? <input type="radio"/> Yes <input checked="" type="radio"/> No	Reasons arrest not made on-scene: <input checked="" type="radio"/> No Offense Committed <input type="radio"/> No Probable Cause <input type="radio"/> Suspect Off-Scene		
<input type="radio"/> Warrant/Criminal Summons to be requested <input type="radio"/> Violation level: not in police presence (no citizen's arrest) <input type="radio"/> Other:			
Offenses	Law (e.g. PL)	Section (Sub)	Offenses Involved: (check all that apply)
1.			<input type="radio"/> Felony
2.			<input type="radio"/> Misdemeanor <input type="radio"/> Violation <input type="radio"/> Other (Specify)
3.			<input type="radio"/> Registry Checked? <input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Order of Protection? <input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Stay Away Order? <input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Order Violated? <input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Any PRIOR orders? <input type="radio"/> Yes <input type="radio"/> No

Photos Taken? <input type="radio"/> Yes <input checked="" type="radio"/> No	IF YES, photos taken of: <input type="radio"/> Victim Injuries <input type="radio"/> Suspect Injuries	Other evidence collected? <input type="radio"/> Yes <input type="radio"/> No
<input type="radio"/> Scene <input type="radio"/> Damaged Property <input type="radio"/> Other:	IF YES, describe:	

Results of investigation and basis of action taken. (Were excited utterances, spontaneous admissions or spontaneous statements made?) ☐ Yes ☐ No (Complete 710.30 or other form when applicable).

P1 states he is upset w/ P2 over computer files that P2 took off his laptop.

No NAs in home

OTHER AGENCIES involved with the parties or incident (e.g. advocates, hospital, probation):	<input type="radio"/> Guns in House <input type="radio"/> Guns Seized <input type="radio"/> Has Permit <input type="radio"/> Permit Seized Issuing County:
Is there reasonable cause to suspect a child may be the victim of abuse, neglect, maltreatment or endangerment? <input type="radio"/> Yes <input type="radio"/> No IF YES, officer must contact the NYS CHILD ABUSE HOTLINE REGISTRY # 1-800-635-1522	Permit #(s): Name on Permit(s):

CONTACTS INITIATED BY POLICE: <input type="radio"/> Adult Protective Services <input type="radio"/> Child Protective Services (or ACS) <input type="radio"/> Domestic Violence Services <input type="radio"/> Firearms Licensing	<input type="radio"/> Mental Health <input type="radio"/> Parole <input type="radio"/> Probation <input type="radio"/> Rape Crisis <input type="radio"/> Other Agency:
Officer's Signature (Rank)	Date: Who was notified? Notified by (initial):

Supervisor's Signature (Rank)	(PRINT and SIGN) ID	Month	Day	Year	<input type="radio"/> Was D/R given to the victim at the scene? <input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Was Victim Rights Notice given to victim? <input type="radio"/> Yes <input type="radio"/> No IF NO, give reason:

VICTIM / COMPLAINANT COPY

Page 2 of the NYS Domestic Incident Report:
STATEMENT OF ALLEGATIONS / SUPPORTING DEPOSITION

Suspect Name (Last, First, M.I.)

Richard Blakeman

I, Richard Blakeman (victim/deponent name), state that on 2/7/12, (date) at 6:30 pm
 Yo, (nombre de victima/deponente), declaro que en tal fecha 2/7/12 en NYC

(location of incident), in the County/City/Town/Village of NYC, of the state of New York, the following did occur:
 (donde el incidente ocurrio), el condado/ciudad/aldea/pueblo de NYC, del estado de Nueva York, lo siguiente ocurrio:

When I came home on the evening of Feb 7 after picking up my daughter Sydney ~~from~~ from Hebrew School, I noticed that my personal non shared computer had been accessed. ~~I told my wife~~ I confronted my wife and she did not deny it. After Tuesday's night incident, ^{2/15/12} I took a much closer look at what files were downloaded and deleted. I now realize that she downloaded Confidential Attorney client privileged documents, and doctor patient documents. ~~She also deleted some files but~~ I think some files have been deleted but I am unsure which ones at this time.

2/15/12

She took Jewelry and my watch from a shared safe

(Use additional pages as needed)

False Statements made herein are punishable as a Class A Misdemeanor, pursuant to section 210.45 of the Penal Law.
 Declaraciones falsas hechas aqui son castigables como una clase de delito menor, de acuerdo con la seccion 210.45 de la ley penal.

Richard Blakeman
 Victim/Deponent Signature
 Firma de victima/deponente

2/16/12
 Date
 Fecha

Interpreter

Date

Witness of Officer

Date

Note:
 Whether or not this form is signed, this DLR form will be filed with law enforcement.
Note:
 Si esta forma esta firmada o no, esta DLR forma sera registrada con la policia.

Exhibit C

LEWIS & LIN LLC

45 Main Street, Suite 608
Brooklyn, NY 11201-8200
>>>Tel: (718) 243-9323
>>>Fax: (718) 243-9326

www.ilawco.com

December 18, 2013

VIA EMAIL AND US MAIL

Alan Nelson, Esq.
3000 Marcus Avenue, Suite 1E5
Lake Success, NY 11042
Tel.: (516) 328-6200
Email: anelsonlaw@aol.com

Blakeman v. Blakeman
(Case No.: 13-cv-07348-LTS)

Dear Mr. Nelson:

I am writing in response to your letter dated December 16, 2013, in which you decline to withdraw the counterclaims and attach a copy of a police report, which you contend provides evidentiary support for those counterclaims.

As a preliminary matter, the entire factual basis for the counterclaims are self-serving allegations made in a police report, which allegations are not corroborated by any credible evidence. The above statement does not allege the use of spyware, or the interception of emails. The above allegations were also curiously omitted from the police report that your client filed on February 14, 2012, in which he falsely reported that Ms. Blakeman had stolen his watch. See attached. These spurious claims fail to support a cause of action under the Wiretap Act or the Stored Communications Act.

If the above were not enough, the enclosed email dated February 2, 2012 from your client's matrimonial counsel, Alex Potruch, Esq., to Rachel Blakeman's matrimonial counsel, Marian Shelton, Esq., undermines any factual basis for the counterclaims. That email, which is dated five days before the date on which your client swore that Ms. Blakeman accessed his "personal non shared computer," concedes that the allegedly downloaded files were "easily accessible." Moreover, Mr. Blakeman's own attorney did not then allege that the computer in question was your client's non-shared *personal* computer, as alleged in the counterclaim. Again, there were no allegations of spyware or intercepting email communications.

It is also noteworthy that Mr. Blakeman filed a police report accusing Ms. Blakeman of downloading files from his computer only after he had *twice* been caught intercepting Ms. Blakeman's emails and forwarding them to his account. Combined with your client's deposition testimony, first denying, then admitting his use of spyware to intercept and download our client's email communications, and the Supreme Court's finding that your client's testimony was not credible in issuing a protective order, more than naked reliance on a self-serving police report, which does not even allege facts that support a cause of action under the counterclaims asserted, is necessary to provide a factual basis for the counterclaims.

We strenuously disagree that our motion is being advanced for an improper purpose. No degree of zealous advocacy can justify reliance on the self-serving, non-corroborated statements of a defendant

who has already perjured himself in a related matter, and whose testimony has been found by at least one court to lack credibility. We respectfully request that you re-think your response to our draft motion. Should your client not withdraw all of his counterclaims by no later than December 27, 2013, we will move for Rule 11 sanctions.

Finally, we are available to discuss the above, as well as the answers to paragraphs 35, 38, 48-50, 68-69 and 79, as referenced in our draft motion, at your convenience.

Regards,



Justin Mercer, Esq.

From: Alex Potruch <ap@potruch.com>

To: mrsheltonlaw <mrsheltonlaw@aol.com>

Subject: Blakeman

Date: Thu, Feb 2, 2012 4:55 pm

Marian,

I was distressed to read your email.

Richard has told me that the situation in the house is tense but there is no denigration of each other especially in front of the children.

Your client, as you know, removed files from the computer which were confidential in nature (but easily accessible). I am not critical but what I don't like is that she taunts him on a daily basis; i.e.; "you're gonna be out of here soon...", etc.

He did set up a direct deposit for the insurance and made the payment. This disability policy is paid monthly but was delayed since the doctor did not send the forms. That was finally done yesterday. There will be no change of the status quo. Richard asked Rachel what bills are due since he does not access the joint bank account. He will pay ½ of the bills as they become due.

I will not barrage you with his description of what has transpired from his vantage point in the recent post. The important thing is that I will you know, speak to him (as you will to her) about keeping everything civil- including giving each other some space.

I will speak to you later.

Regards,

Alexander Potruch
666 Old Country Road
Suite 555
Garden City, New York 11530
516-739-3737 (p)
516-739-3833 (f)
ap@potruch.com

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Page 2 of the NYS Domestic Incident Report:
STATEMENT OF ALLEGATIONS / SUPPORTING DEPOSITION

Suspect Name (Last, First, M.I.)

Blackman Rachel

I, _____ (victim/deponent name), state that on ____/____/____, (date) at ____
 Yo, _____ (nombre de victima/deponente), declaro que en tal fecha ____/____/____ en _____

(location of incident), in the County/City/Town/Village of _____, of the state of New York, the following did occur:
 (donde el incidente ocurrio), el condado/ciudad/aldea/pueblo de _____, del estado de Nueva York, lo siguiente ocurrio:

Refused

(Use additional pages as needed)

False Statements made herein are punishable as a Class A Misdemeanor, pursuant to section 210.45 of the Penal Law.
Declaraciones falsas hechas aqui son castigables como una clase de delito menor, de acuerdo con la seccion 210.45 de la ley penal.

Victim/Deponent Signature
 Firma de victima/deponente

Date
 Fecha

Interpreter

Date

Witness or Officer

Date

2-15-12